Decision 01-11-032 November 8, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (E 3338-E for Authority to Institute a Rate Stabilization Plan with a Rate Increase and End of Rate Freeze Tariffs.	Application 00-11-038 (Filed November 16, 2000)
Emergency Application of Pacific Gas and Electric Company to Adopt a Rate Stabilization Plan. (U 39 E)	Application 00-11-56 (Filed November 22, 2000)
Petition of THE UTILITY REFORM NETWORK for Modification of Resolution E-3527.	Application 99-10-028 (Filed October 17, 2000)

ORDER DENYING APPLICATIONS FOR REHEARING OF DECISION 01-03-029

I. SUMMARY

By this decision, we deny the applications for rehearing filed by Southern California Edison (SCE) and Pacific Gas & Electric Company (PG&E). We also grant limited rehearing of D.01-03-029 sought by the City and County of San Francisco, et al. and by the Southern California Local Entities (Cities).

II. FACTS

The Coalition of California Utility Employees (CCUE) filed an emergency motion on January 8, 2001, seeking to prevent PG&E and SCE from laying off workers until the Commission had an opportunity to review their proposals. A prehearing conference was held on January 10, 2001, which discussed the motion, among other matters. SCE and PG&E were directed to file

a response to the motion by January 12, 2001. Responses were also filed by William P. Adams and The Utility Reform Network (TURN). CCUE also filed a reply to the utilities' responses.

On January 23, 2001, an Assigned Commissioner Ruling (ACR) was issued directing SCE and PG&E to provide additional information about the impact of the proposed layoffs. The ACR also directed the utilities to demonstrate that the benefits of the proposed layoffs in dollar savings will offset the potential cost to customers, employees and the general public in terms of reduced levels of service and safety, and losses in income and pension benefits to affected employees. The ACR announced that hearings would be held on February 2 and 5, 2001. SCE and PG&E filed their responses to the ACR on January 25, 2001. Replies to the utilities' response by CCUE and other interested parties were submitted on January 30, 2001. PG&E supplemented its response on January 26 and 30, 2001.

On February 2 and 5, 2001, hearings were held. Instead of oral argument, parties were permitted to file briefs supporting or opposing CCUE's motion on February 6, 2001. CCUE, PG&E, SCE, and TURN filed briefs. Action on CCUE's motion was postponed from February 8 until March 7, 2001.

Due to their interest in the suspension of PG&E's undergrounding services as part of its cost cutting measures, the City of Oakland, the County of Alameda, and the City of San Leandro filed petitions to intervene on March 1, 2001, March 2, 2001, and March 5, 2001, respectively. San Francisco filed a similar motion on April 19, 2001. Although the petitions were not filed until after the conclusion of the hearings, the petitions were granted because the comments were relevant to PG&E's cost cutting measures.

D.01-03-029 was issued on March 15, 2001, granting CCUE's motion. On April 18, 2001, the Local Governments filed their rehearing application. On April 19, 2001, SCE, PG&E, and the City and County of San Francisco *et al*. filed rehearing applications.

On April 18, 2001, the Local Governments filed a Joint Emergency Motion to Require Southern California Edison to Resume Rule 20A Program.

On May 11, 2001, PG&E filed its Response to the City and County of San Francisco's rehearing application. SCE was granted permission to file a late response to the rehearing applications, which it filed on May 11, 2001. SCE was also granted permission for the late filing of its Response to the Joint Emergency Motion of SoCal Government Entities Regarding the 20A Program, which it filed on May 18, 2001.

III. DISCUSSION

One of the grounds upon which PG&E and SCE challenge D.01-03-029 is that the Decision is preempted by federal labor laws. SCE argues that federal law preempts the Commission's exercise of jurisdiction to decide the CCUE motion, asserting that §301 of the Labor Management Relations Act ("LMRA," also known as the "Taft-Hartley Act") vests exclusive jurisdiction to resolve labor contract disputes in the federal courts. (SCE's Rhg. App., pp. 6-7.) PG&E claims that the Commission's order is preempted by the National Labor Relations Act (hereinafter, "the Act"), 29 U.S.C. §151 *et seq*. (PG&E's Rhg. App., pp. 5-6.)

Like SCE, PG&E has misinterpreted the law. Both PG&E and SCE overstate their cases and make sweeping generalizations about the law that applies to this proceeding. PG&E further asserts that the Decision does not seriously address PG&E's preemption arguments. Here, we closely examine PG&E's and SCE's preemption arguments.

A. SCE's Arguments

1. Preemption

Federal law does not give federal courts exclusive jurisdiction over claims brought under LMRA. The LMRA is a jurisdictional statute, Section 301(a) of which provides as follows:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, *may be brought* in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."[1]

The U.S. Supreme Court in *Charles Dowd Box Co., Inc., v. Courtney et al.,* 368 U.S. 502, 507 (1962) held that federal jurisdiction under §301(a) is not exclusive:

> "On its face §301(a) simply gives the federal district courts jurisdiction over suits for violation of certain specified types of contracts. *The statute does not state nor even suggest that such jurisdiction shall be exclusive. It provides that suits of the kind described 'may' be brought in the federal district courts, not that they must be*."[2]

The Court acknowledged that federal and state courts have concurrent jurisdiction over suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce:

> "We start with the premise that *nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law*. Concurrent jurisdiction has been a common phenomenon in our

[1] 29 U.S.C. §185; emphasis added.

[2] *Dowd Box Co., supra at 507-08*; emphasis added.

> judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather the rule…*To hold that §301(a) operates to deprive the state courts of a substantial segment of their established jurisdiction over contract actions would thus be to disregard this consistent history of hospitable acceptance of concurrent jurisdiction.*"[3]

The Act is a framework for negotiations and is "concerned primarily with establishing an equitable process for determining terms and conditions of employment." (*Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 616 (1986). Its declared purpose is to remedy "[the] inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract,…." (*Metropolitan Life Ins. Co. v. Mass*., 471 U.S. 724, 753 (1985).) The Act and the NLRB were intended to facilitate bargaining between the parties. No such bargaining characterizes the facts here.

The test for whether §301 is triggered is whether there is *substantial dependence* on a collective bargaining agreement (CBA).[4] The answer turns on the specific facts of each case. In *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983), the Court explained that §301 preempts only "claims founded directly on rights created by collective-bargaining agreements, and also claims *substantially dependent* on analysis of a collective-bargaining agreement." In another case, the Court rejected an employer's contention that "*all* employment-related matters involving unionized employees be resolved through collective bargaining and thus be governed by a federal common law created by §301."[5]

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[3] *Ibid*.

[4] *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

[5] *Elec. Workers v. Hechler*, 481 U.S. 851, 859, n. 3 (1987); emphasis added.

In *Livadas v. Bradshaw*, 512 U.S. 107 (1994), the Court held that preemption was not required because the plaintiff's claim was independent of the CBA, and the court only looked to the CBA to determine her rate of pay. (*Id*. at 124-25.) Here, the Commission's order relates to the adequacy of service. This is independent of the CBA. In *Lingle v. Norge Division of Magic Chef, Inc*., 486 U.S. 399 (1988) an employee was able to litigate her retaliation suit under state law without reference to the CBA, and the Court held it was not preempted. The Court noted that "even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for §301 pre-emption purposes." (*Id*. at 409-10.)

SCE relies on *Allis-Chalmers Corp v. Lueck*, 471 U.S. 202 (1985) as controlling authority for this proceeding. This reliance is misplaced. *Allis-Chalmers* involved a state law tort claim for bad-faith delay in making disability benefits payments due to an employee under a CBA. The Court held that this state law tort action against an employer *may* be preempted by §301 if the duty to the employee of which the tort is a violation is created by a collective-bargaining agreement and without existence independent of the agreement. The Court held further that §301 applies to those cases whose resolution "*is substantially dependent* upon analysis of the terms of an agreement made between the parties in a labor contract." (*Id*. at 220.) Neither of these conditions pertains here.

SCE attempts unsuccessfully to mold *Allis-Chalmers* to the facts of this case. This proceeding does not involve an employee suing an employer for enforcement of a collective-bargaining agreement. The focus here is on ensuring that consumers have safe and reliable service. (D.01-03-029, *mimeo*, p. 33.) Collective bargaining is a tangential issue. Even assuming that there is substantial dependence on a CBA, it is not necessary for all collective-bargaining claims to be handled by the National Labor Relations Board (NLRB), as PG&E suggests. The

U.S. Supreme Court declared that sometimes the courts are favored over the NLRB:

> "The strong policy favoring judicial enforcement of collective-bargaining contracts was sufficiently powerful to sustain the jurisdiction of the district courts over enforcement suits even though the conduct involved was arguably or would amount to an unfair labor practice within the jurisdiction of the National Labor Relations Board."[6]

Here, the state is implementing its statutory duty to ensure that SCE and PG&E provide adequate, efficient, just and reasonable service. Even *Allis-Chalmers* acknowledges that "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by §301 or other provisions of the federal labor law."[7] Under the facts presented here, §30l is not triggered; thus, SCE's preemption argument fails. Even if §30l were triggered, the state has concurrent jurisdiction over such claims, but federal law would apply.

Moreover, the attempt by SCE to apply *Allis-Chalmers* broadly is not supported by the Court:

> "It is perhaps worth emphasizing the narrow focus of the conclusion we reach today. We pass no judgment on whether this suit also would have been pre-empted by other federal laws governing employment or benefit plans. Nor do we hold that every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by §301. The full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis."[8]

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[6] *Arthur Groves, Bobby J. Evans and Local 771, International Union UAW v. Ring Screw Works,* 498 U.S. 168, 173 (1990). See also *Tafflin v. Levitt,* 493 U.S. 455 (1990).

[7] *Allis-Chalmers, supra* at 211.

[8] *Id.* at 219.

The facts of this proceeding lead to the legal and reasonable conclusion that preemption is not warranted.

2. The Commission's Use of its Police Power under PU Code §761 Was Necessary and Proper.

SCE asserts that the Commission's "'safety jurisdiction'… cannot be used to avoid the consistent application of federal law, or the negotiated-for dispute resolution procedures of the CBAs [collective bargaining agreements]." (SCE's Rhg. App., pp. 10-11) SCE is clearly mistaken. It is well-known that "[t]he commission has been given broad powers to regulate the relationship of the utility to the customer; thus it can determine the services that must be provided by the utility and the rates therefor. The Commission has also been given certain specific powers to regulate the manner in which the utility provides the required services to safeguard the utility's ability to serve the public efficiently…." (*Gen. Tel. Co. of California v. PUC*, 34 Cal.3d 817, 827 (1983); (*Pac. Tel. & Tel. Co. of California v. PUC*, 34 Cal.2d 822, 827 (1950).) In ensuring that PG&E and SCE adhere to their service quality standards, the Commission is simply exercising its jurisdiction.

As noted above, states have concurrent jurisdiction over suits filed under §301. State courts retain jurisdiction unless state law conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the total circumstances that Congress sought to occupy the field to the exclusion of the states.[9] Such is not the case here. The Court has made it clear that "[w]e cannot declare pre-empted all local regulation that touches or concerns in any way the

[9] *Malone v. White Motor Corp*., 435 U.S. 497, 504 (1978). In this case, the Court rejected the view that a right established in a state pension statute was pre-empted by the NRLA simply because the NLRA empowered the parties to a collective-bargaining agreement to come to a private agreement about the subject of the state law.

complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States."[10]

SCE further asserts that D.01-03-029 is not a proper exercise of the Commission's police power under Public Utilities (PU) Code §761 because "the Commissioners in the majority do not unqualifiedly assent to the necessary affirmative finding(s) that SCE's 'rules, practices, or service' are actually, as a matter of fact or law, 'unjust, unreasonable, unsafe, improper, inadequate, or insufficient.'" (SCE's Rhg. App. at 3-4.) SCE has interposed a condition precedent requirement upon §761 that does not exist. Furthermore, SCE did not cite any authority to support its claim that "unqualified assent" is necessary for the Commission's findings.

The Commission's safety jurisdiction is an integral part of its police power. Moreover, the jurisdiction to determine the adequacy of service being rendered by public utilities is vested exclusively in the Commission.[11] Once the decision is adopted, its findings become the Commission's findings, notwithstanding the dissent by Commissioner Bilas and the concurrences by Commissioners Duque and Brown. If unqualified assent was required before the Commission could invoke its police power, the Commission's authority to protect the public health and safety would be limited to unanimous decisions only. Neither the state Constitution nor the Legislature intended that result.

The imminent threat to service quality impelled the Commission to take action. In presenting its Proposed Plan to the Commission, SCE made numerous admissions that there would be serious degradations of service, including the risk of customer overcharges if meters were read every other month,

[10] *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289 (1971); see also *Brown v. Hotel and Restaurant Employees*, 468 U.S. 491 (1984); *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 757 (1985).

[11] *Citizens Utilities Co. of California v. Superior Court for Alameda County* (App.1 Dist. 1976) 56 Cal.App.3d 399; *People v. Northwestern Pac. R. Co.*(1937) 20 Cal.App.2d 120, 123; California Pub. Util. Code §761.

instead of monthly. The Commission took the following admissions under consideration (not an exhaustive list):

- SCE's cost cutting program will result in a reduction in the service provided to its customers (D.01-03-029, *mimeo*, p. 11);

- SCE believes that the hiring freeze will increase the average speed of answer time for telephone representatives responding to customer call from 40 seconds to 50 or 60 seconds during peak call volume months (*Id.* at 12);

- SCE anticipates that some outages may be lengthened (*Id.* at 13);

- The cost cutting program has significantly reduced and deferred the infrastructure replacement program and eliminated the annual circuit review program (*Id.* at 14);

- SCE will replace components less frequently, and may not replace them before they fail; as a result, long-term reliability of the T&D system will degrade, or alternatively, costs to maintain the system will increase, or both (2 R.T. 105);

- SCE estimates that about 3.3 million out of 4.5 million customers would be affected by SCE's reading of meters every other month (2 R.T. 92); (p. 15);

- SCE acknowledged that if there are three levels of variable rates and estimated usage estimates a customer's usage above one of the cutoffs when the actual usage is below the cutoff, the customer could be overcharged that month (2 R.T. 90). (D.01-03-029, *mimeo*, at p. 15.);

Among other factors, the Commission balanced whether the savings from the layoffs justified unreasonable service in light of the fact that SCE agreed that "if it implements its cash conservation measures, including the layoff of management and reducing the rank and file by an additional 1,000 employees, the total savings would amount to less than one month's worth of power at current prices."[12] The

[12] Decision, *mimeo*, p. 15.

Commission implicitly determined that the savings did not justify unreasonable customer service. (Finding of Fact 15)

Based on the totality of the circumstances, the Commission made findings in D.01-03-029 that it deemed necessary to require that the layoffs that PG&E and SCE have implemented, or are in the process of implementing, are rescinded to the extent that they adversely affect customer service. Specifically, Ordering Paragraph No. 1 rescinds the layoffs "to the extent that the positions that were terminated *adversely affect* the respective utility's ability to: fully staff their customer call centers; read meters on a monthly basis for all customers; timely respond to service calls and outages; and to connect new customers."[13] If SCE can show that the layoffs do not adversely affect customer service, rescission may not be necessary. Since SCE has already admitted to the adverse impact on customer service, it cannot now claim no adverse impact. The findings support the Decision. SCE's attempt to piggyback the Commission's alleged lack of guidance of service quality standards into a claim of arbitrary and capricious findings has no merit.

3. The Decision Is Adequately Supported by the Evidentiary Record.

SCE claims the Commission committed fundamental analytical error in allegedly confusing two inquiries: 1) whether, as a result of the cost-cutting measures, SCE's level of service would be unreasonable; 2) whether SCE's decision to undertake cost-cutting measures was unreasonable. (SCE's Rhg. App. at 11.) SCE contends that since the Commission erroneously intertwined the "two separate inquiries," the findings resulted from erroneous reasoning and are not supported by record evidence. There is no merit to this argument.

SCE contends that the distinctions between the questions and the evidence required to reach the conclusions "becomes clear" in that the first inquiry

[13] D.01-03-029, *mimeo*, Ordering Paragraph 1(a).

forms the basis for the Commission's "safety" jurisdiction. This jurisdiction, SCE asserts, is dependent upon a properly supported affirmative finding regarding whether SCE's service would be unreasonable as a result of the cost-cutting measures. According to SCE, such a finding is required before the Commission can exercise its police power under §761. But, SCE argues, since the Commission's analysis and findings are faulty, the decision is not supported by record evidence.

One thing is clear, and that is that SCE has twisted its police power argument into an evidentiary one. We reject SCE's attempt to reframe the issues so that its police power argument could be converted into a claim that the decision is not supported by the evidentiary record. Moreover, the two inquiries that SCE attempts to distinguish amount to distinctions without a difference, for purposes of this analysis.

SCE purports not to know why it did not prevail in the Commission's resolution of the CCUE Motion, asserting that the terms of the Decision did not provide guidance as to what SCE must show, nor did it provide "any reference to, or definition of a standard to measure the quality of utility service." (SCE's Rhg. App. at 13.) Not being a newcomer to utility regulation, SCE is charged with having some familiarity with service quality obligations as contained in its tariffs, the PU Code and the General Orders. In explaining its Proposed Plan, SCE claims it is complying with the inspection and maintenance requirements of G.O. 165, as well as PU Code §364 and §330(i). (Decision, *mimeo*, p. 14.) At the very least, this reflects some knowledge on the part of SCE that there are inspection and maintenance requirements of G.O. 165, as well as PU Code §364 and §330(i). Moreover, SCE is presumed to know its own tariffs, which set forth with particularity the service quality standards by which it is measured. The Commission has not altered those standards. Indeed, the fact that the Commission is holding SCE to those standards appears to be a major source of SCE's concerns.

SCE contends that "the Commission did not enunciate, and apparently did not adhere to specific a [sic] standard of reasonable and adequate service." (SCE's Rhg. App., p. 14.) SCE then purports not to know what "reasonable service" means, but gives a dictionary meaning of the word on page 15 of its rehearing application. There should be no mystery about what reasonable service means. "Reasonable" as used in PU §451 or §761 (see Decision, *mimeo*, pp. 31-32) is given its ordinary meaning, which coincides with what SCE found in the dictionary. Courts generally turn to general dictionaries when they wish to ascertain the ordinary meanings of words in a statute. For example, in *River Lines, Inc. v. Public Utilities Commission* (1965) Cal.2d 244, 247, the California Supreme Court used a dictionary to show the meaning of the "ordinary concept of a carrier" under the PU Code. "Reasonable," as used in D.01-03-029, coincides with the ordinary meaning of the word. The Decision leaves no doubt about the service quality standards that SCE and the other energy utilities are expected to meet.

SCE asserts that "[c]ommon logic demands that the statement of such a [reasonable and adequate] standard is required under Section 1705 as justification of any general conclusion that service quality is unreasonable." (SCE's Rhg. App. at 14-15.) The Legislature straightforwardly laid down the requirements of PU Code §1705. SCE's allegations of extraneous requirements, which it imputes to §1705, are not worthy of serious discussion. The Commission made the necessary material findings in compliance with PU Code §1705. We also disavow SCE's imputing to the Commission presumptions that it plucks out of thin air. SCE opines that the Commission's findings of unreasonable service quality can only be the result of a presumption that *any* deviation from pre-crisis service levels is inadequate." (SCE's Rhg. App., p. 15; emphasis in original.) There is no basis or foundation for this assertion.

4. The Decision is Compatible with Fundamental Principles of SCE's Incentive-Based Ratemaking Structure

SCE next argues that the decision is incompatible with our previous decisions on Performance Based Ratemaking (PBR). The company has previously made this argument and we dealt with it extensively in D.01-03-029, beginning at page 35. The company has not established legal error with respect to this issue in its application for rehearing in this application. We reiterate that the decision is in no way in conflict with previous decisions on this subject. As we previously stated, the PBR mechanism was adopted as a tool to increase efficiency through lowering costs, but it was never our intent (nor that of the utilities) to lower costs by reducing service to a level below adequate, efficient, just and reasonable service. (D.01-03-029, page 36.) Rather, the utilities are encouraged to maintain an acceptable level of service at a lower cost than that found reasonable in previous general rate case proceedings, and therefore earn a higher rate of return. Further, as we stated at page 37 of the decision, we cannot accept SCE's argument that our adoption of a PBR mechanism was intended to render the Commission powerless to prevent the company from taking steps that it knows will degrade the quality of service to customers. The argument is completely without merit.

B. PG&E's Arguments

1. Preemption

In its preemption argument, PG&E cites cases that are unrelated to the facts and the law before us.[14] For example, PG&E cites *Bechtel Construction v. United Brotherhood of Carpenters*, 812 F.2d 1220 (9th Cir. 1987) which involved state intervention to change the negotiated wage rate, which interfered in the collective bargaining process. This is not what we have here. Moreover, when

[14] On page 6 of PG&E's Rehearing Application, it cites cases which involve direct and substantial interference with the collective bargaining process. These cases have no application here.

the state interest in regulating conduct is great and the risk of interference with federal regulatory scheme small, the "inflexible application of the preemption doctrine is to be avoided." (*Farmer v. Carpenter*, 430 U.S. 290, 302 (1977).) The state interests in ensuring just and reasonable rates and in protecting the public health and safety are paramount here, and outweigh any alleged, but unproven, interference with federal labor laws. The role of the court "is not to pass judgment on the reasonableness of state policy," but instead "to decide if a state rule conflicts with or otherwise "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal law." (*Thunderbird Mining Co. v. Ventura*, 138 F.Supp.2d 1193, 1198 (2001).

The Decision correctly concluded as follows: "The collective bargaining agreements do not govern nor control the Commission's statutory duty to ensure that the utilities provide adequate, efficient, just and reasonable service." (D.01-03-029, *mimeo*, Conclusion of Law No. 5.) Nor does the Decision intrude into the collective bargaining process. The Commission is simply taking steps to ensure that customer service is not sacrificed by the planned and implemented layoffs. In so doing, the Commission is acting within its jurisdiction. Ordering Paragraph (OP) No. 1 explicitly states that the layoffs are rescinded "to the extent that the positions that were terminated adversely affect the respective utility's ability to fully staff their customer call centers; read meters on a monthly basis for all customers; timely respond to service calls and outages; and to connect new customers." (D.01-03-029, *mimeo*, OP No. 1(a).)

2. The Commission's Findings and Conclusions Regarding the Degradation of Service Are Largely Based on Data Supplied by the Energy Utilities.

PG&E's next claims of error are evidentiary. PG&E challenges record support for the decision, claiming that "[t]he Commission errs in concluding that the relatively slight impacts of PG&E's cash conservation measures on customer service amount to 'inadequate service'." (PG&E's Rhg. App., p. 7.)

PG&E cites Finding of Fact No. 25 and Conclusion of Law No. 6 to support its allegation.[15] Finding of Fact No. 25 simply acknowledges that the Commission may intervene in utility management when necessary in order to ensure reasonable rates or service. After an examination of the record, the Commission determined that the layoffs and cutbacks in overtime resulted in inadequate, unjust and unreasonable service and practices. This determination is the basis for Conclusion of Law No. 6.

PG&E is wrong in alleging that the record is inadequate to support this finding and conclusion. The most damaging evidence of the degradation of PG&E's service quality was derived from PG&E itself. According to PG&E, its announced and implemented layoffs would total about 1,180 employees.[16] The total savings from these layoffs would be approximately $56 million over six months – only enough to allow PG&E to pay for one day's worth of past procurement costs.[17] PG&E asserted that "the savings gained by PG&E through these cash conservation measures cannot and will not offset the extraordinary shortfall between its electric procurement costs and its collected revenue…."[18] PG&E further acknowledged that "[u]nfortunately, as a result of these measures some customer services will necessarily degrade."[19] PG&E conceded that affected service includes an increase in response time to customer calls, an increase in the number of customer bills that are estimated as a result of the meters not being read, delayed new service connections outside the Bay Area, reduced

[15] These citations do not support PG&E's premise. Finding of Fact No. 25 states: "Both utilities acknowledge that the Commission may involve itself in the management of a utility when necessary to ensure reasonable rates or service." Conclusion of Law No. 6 provides as follows: "The practices and services resulting from the layoffs and the cutback in overtime have resulted in inadequate, unjust and unreasonable service and practices."

[16] PG&E laid off 180 employees in December 2000 (Ex. 300, p. 1-1). On January 11, 2001, PG&E laid off 325 more employees and proposes to lay off an additional 675 employees (Ouborg, 2/2/01 RT at 2:13:15.).

[17] *See* Ex. 301; Yura, 2/5/01 RT at 26:5-25.

[18] Ex. 300, pp. 1-3.

[19] Brief of PG&E Regarding the Impact of Proposed Layoffs, p. 4.

distribution of customer requested literature, and minor increase in delayed bills.[20] This evidence formed the foundation for various Commission findings, including Findings of Fact Nos. 13, 14, 15, 16, 17, 19, 20, 21, 26, 27, 30. Many of the findings are also backed up by the KMPG Audit Report (Ex. 305), which is a part of the record.

Next, PG&E attributes a statement to the Commission without citation or proof of its derivation. PG&E claims: "First, as the Commission acknowledges, there was no impact on safety and reliability, the utility's primary service obligation." (PG&E's Rhg. App. at 7.) We disagree with PG&E's characterization of the Commission's position. Since PG&E does not give a clue as to where or in what context the acknowledgement was allegedly made, we have no choice but to give it little weight.[21]

In explaining our focus, we reiterate what we stated in Finding of Fact No. 9: "The Commission's concern is whether the layoffs and cost cutting measures affect the utilities' provisioning of adequate, efficient, just, and reasonable service that are necessary to promote the safety, health, comfort, and convenience of its customers, employees, and the public." It is this concern that drives this decision.

3. PG&E Misstates Certain Findings in D.01-03-029 Regarding Its Cash Conservation Methods.

Another ground upon which PG&E challenges D-01-03-029 is its contention that the record fails to support a finding that there was no benefit from PG&E's cash conservation measures. (PG&E's Rhg. App. at 11.) This claim is unmeritorious. The Decision does not contain a finding that there was *no benefit* from PG&E's cash conservation measures. PG&E reached its erroneous conclusion by distorting Findings of Fact No. 24 and Nos. 29. Finding of Fact No.

[20] *Id*. at 9.

[21] California Public Utilities Commission's Rule of Practice and Procedure 86.1

24 states simply that: "The savings from the layoffs and other cost cutting measures are *nominal* when compared to the size of the utilities' debts, but the layoffs have a real effect upon the level of service provided by PG&E and SCE." (Emphasis added.) This finding is true and is supported by the record.

The record, as supplied by PG&E, shows that the total savings from PG&E's announced and planned layoffs would be about $56 million over six months. This would allow PG&E to pay off only one day's worth of past procurement costs. By any measure, this amount is nominal when compared to PG&E's past procurement costs. PG&E itself acknowledged that its "cash conservation measures cannot and will not offset the extraordinary shortfall between its electric procurement costs and its collected revenue…." (Ex. 300, pp. 1-3.) The Decision correctly characterized PG&E's cash conservation measures.

PG&E also claims that Finding of Fact No 24 "is contradicted by FOF 29 [Finding of Fact 29] where the Commission acknowledges the benefits of the cash conservation effort." Finding of Fact No. 29 states: "The cost savings are being used by the utilities to pay various costs on a day-to-day basis, including costs that have been incurred during the rate freeze." There is no contradiction here. The plain language of both findings says nothing more than that the savings from the cost cutting measures are nominal, but whatever savings there are, are being used to pay various costs on a day-to-day basis. We reject PG&E's attempt to substantiate evidentiary claims by distorting the findings.

PG&E's fixation with whether or not its cash conservation measures resulted in inadequate service is a red herring. The fact of the matter is, regardless of the cause, when the Commission finds inadequate service, the Commission may exercise its authority and discretion to ensure that customer service meets the Commission's standards. To the extent that PG&E's cash conservation measures contribute to substandard service, the Commission is obligated to act. PG&E asserts that "the Commission should have left to utility discretion how the reduction in service should be restored." (PG&E's Rhg. App. at 9.) There is little

mystery to how a reduction in service should be remedied, and the Commission's specificity concerning how that should be accomplished avoids the utilities' claims of vagueness.

4. D.01-03-029 Does Not Constitute Unlawful Micromanagement.

PG&E asserts that the Commission does not have the power to manage the utility's business. (PG&E's Rhg. App. at 9.) At the same time, PG&E acknowledges that the California Supreme Court honors the principle that the size of PG&E's workforce is primarily a matter of PG&E's management discretion *except* "where Commission involvement with management functions of the utility is strictly necessary to ensure adequate or improved customer service."[22] The facts here fall squarely under this exception. The Commission has no desire to "manage" PG&E's business, but the Commission is obligated to carry out its constitutional and statutory obligations.

As the state regulator, the Commission unavoidably engages, to some extent, in some functions of management. Pursuant to the Commission's constitutional and statutory authority over public utilities, those functions are not unlawfully invaded. Those functions flow out of the state's exercise of the police power in the regulation of public utilities. (*Southern Pac. Co. v. PUC*, 41 Cal.2d 354, 367 (1953).) The main purpose of D.01-03-029 is to better serve the consumer, not to run the utility's business.

5. The Decision Does Not Err in Requiring that PG&E Track Costs and Savings for Future Adjustment.

Ordering Paragraph 3 and Conclusions of Law 12-14 direct PG&E to establish a memorandum account to track savings and costs. PG&E objects to this requirement because "the issue of tracking costs and savings for future revenue adjustment was not raised by CUE's motion nor listed as an issue for

[22] PG&E's Rhg. App. at 9, citing *General Tel. Co. v. PUC*, 34 Cal.3d 817, 826-27 (1983).

hearings." (PG&E's Rhg. App. at 10.) PG&E cannot claim to be surprised that the Commission would want to look at costs and savings while developing a rate stabilization plan, which is what PG&E's application in this proceeding is about. In shaping such a plan, the Commission is obligated to ensure that "[a]ll charges demanded or received by any public utility…shall be just and reasonable." (PU Code §451.) We reject PG&E's attempt to convert the Commission's proper exercise of its discretion to a due process claim.

Requiring PG&E to establish a memorandum account to track costs and savings is not a novel approach. It has been done in any number of cases. Memorandum accounts are tools at the Commission's disposal, which may be used to keep track of and account for costs and savings.[23]

6. PG&E's Claims of Constitutional Violations Due to Alleged Inadequate Funding Have No Merit.

PG&E also argues that the decision requires it to provide unchanged distribution service with inadequate funding, amounting to a confiscatory taking of PG&E's property without due process or just compensation. (PG&E's Rhg. App. at 12.) This is a creative argument, but lacking in merit. The California Supreme Court has stated that the exercise of police power in the regulation of public utilities becomes a taking "when an order passes beyond proper regulation."[24] In enforcing existing service standards, the Commission's order in D.01-03-029 is well within the proper regulation of the energy utilities.

More recently, in the takings context, the California Supreme Court held that there was no taking of property under the Fifth and Fourteenth Amendments of the U.S. Constitution when a state agency delayed a development from going forward by mistakenly assuming jurisdiction over a lot line

[23] See, e.g., D.93-03-025, p. 4.

[24] *Pacific Tel. & Tel. Co. v. Eshleman*, 166 Cal.640, 663 (1913). In *Pacific Tel.*, the Court found that the Commission's order requiring Pacific Telephone to permit connection between its long distance lines and the local lines of competing companies was an exercise of eminent domain.

adjustment.[25] The Court found that, although erroneous, the Coastal Commission's actions advanced a legitimate state interest by contributing to the goals of coastal protection with which it was charged. The Court further held that the agency's action was not sufficient to constitute constitutional error, and that the latter would be implicated only if the agency's action was "so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development of the project before it."[26] Ensuring that the energy utilities provide adequate and reliable service is reasonable from both a factual and legal standpoint. It is a legitimate state interest that falls under the Commission's constitutional and statutory duty to regulate public utilities.

The company complains that it has been seeking for over six months a determination from the Commission that it is entitled to recover from ratepayers the "dramatic revenue shortfalls that have accrued as a result of exploding wholesale costs and frozen retail rates." However, the company's present financial situation is completely unrelated to our order contained in D.01-03-029. This decision only ordered PG&E to rescind previously made layoffs and cancel future ones. The company itself acknowledged that the potential cost savings flowing from the layoffs would not "materially improve their financial condition." (D.01-03-029, *mimeo*, p. 2.)

Further, and of more significance, PG&E is presently being fully compensated in rates for the expenses associated with the employees proposed to be laid off. In the company's last general rate decision, we specifically considered and included in rates PG&E's projected labor expense. To take just one example, meter reading, which is one of the areas in which PG&E proposes cuts, we gave the company the full amount it requested for this account, $71.1 million, in spite of the fact that ORA proposed only $62.9 million for this expense. (D.00-02-046,

[25] *Landgate v. California Coastal Commission*, 17 Cal.4th 1006 (1997).
[26] *Id.* at 1024.

mimeo, p. 331**.**) The company is not alleging that it is spending more than the adopted amount for this service. Rather, the argument appears to be that the Commission should approve an unacceptable deterioration in customer service because of the company's financial straits caused by a completely unrelated factor, i.e., increases in wholesale prices. The company is being fully compensated for the services it proposes to curtail. The argument is therefore without merit.

C. Applications by Cities

The Cities and SoCal Local Government Entities ("Cities") have filed Applications for Rehearing as well as an Emergency Motion to require that the companies be required to continue undergrounding of their transmission facilities. They argue that the decision constitutes a violation of their constitutional rights because they were not apprised that this action was being contemplated by the Commission or by the parties in the original Emergency Motion filed by CCUE, which was the impetus for this proceeding. The Cities are correct. They had no such notice. In fact, the Commission recognized this fact in D.01-03-029, page 39:

> "The issue of the deferral of undergrounding projects was not squarely raised by the CCUE motion. As a result, the cities and counties did not bring this issue to the Commission's attention until their comments to the proposed decision were submitted. Thus, at this time, the Commission lacks a record upon which to determine whether the utilities should be required to resume their undergrounding projects. However, the cities and counties may file with the Commission any appropriate pleadings designed to place this issue before the Commission for resolution. We note that nothing in this order is intended to prejudge this issue should it be brought before the Commission."

We will therefore order rehearing of this issue. All parties may file with the Commission written responses relating to this question within 30 days of the mailing of this order. Should any party request an oral hearing on this issue, it should include such request in its response. Such a request should indicate the

material issues of fact requiring hearing, the evidence it proposes to present, and the reasons why it cannot be treated sufficiently in a written response.

IV. CONCLUSION

For the foregoing reasons, we deny the applications for rehearing sought by PG&E and SCE and grant limited rehearing as provided below to the Cities.

Therefore, **IT IS ORDERED** that:

1. The applications for rehearing filed by PG&E and SCE of D.01-03-029 are denied.

2. The applications for rehearing filed by Cities are granted. Such rehearing will be limited to written responses to be filed by the parties within thirty days of the mailing date of this order, as described above. Any party requesting oral hearings shall do so in its written response. Such request must set out with specificity the material issues of fact, and the evidence it wishes to present.

This order is effective today.

Dated November 8, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

Commissioner Henry M. Duque, being necessarily absent, did not participate.